Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

WILLIE E. WILSON, JR.,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
CANNON EXPRESS COMPANY,
JEFFREY R. WALSH, and
NATIONAL CONTINENTAL
INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED FOR REVIEW

Whether the deliberate withholding of surveillance tapes taken of the Plaintiff prior to trial, but secretly withheld from Plaintiff's attorneys until mid-way through the trial, which the trial judge admitted into evidence over Plaintiff's attorneys' repeated objections that they were both irrelevant and extremely prejudicial, prevented Plaintiff from receiving a fair trial before an impartial jury (tribunal), in violation of his Due Process and Equal Protection rights guaranteed him by the Fourteenth Amendment to the United States Constitution?

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On Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

Petitioner, WILLIE E. WILSON, JR., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Georgia refusing to grant Petitioner a new trial, after the trial court allowed Respondent Southern Railway to introduce surveillance tapes which had been deliberately withheld from Petitioner's attorneys until mid-way through the trial, although Petitioner's attorneys made repeated objections to their admission based upon the

fact that the tapes were both irrelevant and highly prejudicial towards the Petitioner's case.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is attached, and appears in the Appendix (p.1) to this Petition. The Court of Appeals' denial of the Motion for Reconsideration is attached, and appears in the Appendix (p.15) to this Petition. The opinion of the Supreme Court is attached, and appears in the Appendix (p.17) to this Petition. The Supreme Court's denial of the Motion for Reconsideration is attached, and appears in the Appendix (p.18) to this Petition.

JURISDICTION OF THE COURT

The Supreme Court's opinion in this matter was filed on October 5, 1993. A timely Motion for Reconsideration was filed on October 15, 1993. The Supreme Court's denial of the Motion for Reconsideration was issued on October 28, 1993, and is set forth in the Appendix (p.18) to this Petition. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution as set forth in the Appendix (p.19) to this Petition.

STATEMENT OF THE CASE

Willie E. Wilson, Jr., the Plaintiff in the main action, filed a Complaint against Defendants Southern Railway Company ("Southern"), Cannon Express Company ("Cannon"), Jeffrey R. Walsh ("Walsh"), and National Continental Insurance Company ("Continental"), pursuant to the Federal Employers' Liability Act, which is codified at 45 U.S.C. Section 51 *et seq.*, alleging that the combined negligence of the named Defendants caused Plaintiff to sustain severe personal injuries as a result of a train crossing accident which occurred on or about January 3, 1990, in the City of Plainville, Georgia. The Complaint was filed on April 3, 1991.

On January 3, 1990, Plaintiff, along with two other employees of Defendant Southern Railway Company, were on a train owned by Defendant Southern that was traveling from Chattanooga, Tennessee to Atlanta, Georgia. On the day in question, Plaintiff was the brakeman on the train and the other two employees held the positions of conductor and engineer.

As the crew approached Plainville, Georgia, the men noticed that a tractor-trailer was on the railroad crossing, directly in their path of travel. The tractor-trailer was being driven by Defendant Walsh and was owned by Defendant Cannon. As the train, upon which the crew

were traveling, got closer to the tractor-trailer, the crew realized that the truck was not going to move and that precautionary measures should be taken.

The engineer decided to apply the brakes to the train in order to try to stop the train short of the crossing. When it appeared that the train was not going to stop short of the crossing, the engineer put the train in emergency (i.e., applied the emergency brakes), however, the train eventually collided with the tractor-trailer that was stuck on the crossing. As a result of the impact between the train and the tractor-trailer, Plaintiff suffered severe personal injuries and has had to receive continuous medical treatment from various doctors in an endeavor to cure himself of said injuries.

During the trial of this case, which commenced on July 7, 1992, the trial judge granted Defendants' Cannon's, Walsh's, and Continental's Motion for a Directed Verdict at the close of Plaintiff's case, holding that there were no conflicts in the evidence as to any material issue and that the evidence introduced, with all reasonable deductions therefrom, demanded the verdict. (T-417, lines 15-16). Also, during the trial of this case, the trial judge allowed Defendant Southern to introduce surveillance tapes of Plaintiff which were not made available to Plaintiff's attorneys prior to trial, were irrelevant, biased, unfair and highly prejudicial, *over strenuous objections* by Plaintiff's attorneys. (T-468-470, T-576-580).

As a result of the trial court's rulings, the jury returned with a defense verdict as to Southern Railway Company (the only Defendant remaining at that time);

after which, Plaintiff appealed the verdict to the Court of Appeals of the State of Georgia.

On April 14, 1993, the Court of Appeals affirmed the trial court's grant of a directed verdict in favor of Defendants' Cannon, Walsh and Continental, and erroneously allowed the jury verdict in favor of Defendant Southern to stand.

On April 23, 1993, Plaintiff filed his Motion for Reconsideration, clearly setting-out that the Court of Appeals had overlooked material facts in the record which adversely effected Plaintiff's case. However, on May 5, 1993, the Court of Appeals denied Plaintiff's Motion for Reconsideration.

Thereafter, on May 25, 1993, Plaintiff filed a Petition for a Writ of Certiorari in the Supreme Court of the State of Georgia, which was denied on October 5, 1993. On October 15, 1993, Plaintiff filed a Motion for Reconsideration, which was also denied by the Supreme Court on October 28, 1993.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because neither of the courts below acted in a manner (as referenced by their opinions when considering the factual and legal issues of this case) as to protect those rights guaranteed Petitioner by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The opinions by the courts below

conflict with previous decisions of this Court when considering whether or not one's due process and equal protection rights under the Fourteenth Amendment have been violated, given a certain set of facts.

1. The Lower Courts Overlooked Material Facts In The Record Pertaining To The Deliberate Withholding Of Surveillance Tapes, Which Were Taken Of Petitioner Prior To Trial, But Which Were Secretly Withheld From Petitioner's Attorneys Until Mid-Way Through The Trial, In Violation Of The Petitioner's Constitutional Right To A Fair Trial Before An Impartial Jury (Tribunal).

At the trial of the case in question, Defendant Southern Railway Company was allowed to introduce (over Plaintiff's attorneys' strenuous objections) surveillance tapes that it had taken of Plaintiff prior to trial, but did not make known to Plaintiff's attorneys until mid-way through the trial. The trial court admitted these tapes even though Plaintiff's attorneys' argued that the tapes were irrelevant, biased, and highly prejudicial to the Plaintiff. Defendant Southern deliberately withheld these tapes from Plaintiff's attorneys to the ultimate prejudice and detriment of Plaintiff in violation of the Georgia Civil Practice Act. *Jones v. Atkins*, 120 Ga.App. 487, 490-91, 171 S.E.2d 367 (1969); *Nathan v. Duncan*, 113 Ga.App. 630, 149 S.E.2d 383, 392 (1966); *Hanna Creative Enterprises v. Alterman Foods*, 274 S.E.2d 761 (Ga.App. 1980).

At all times during the discovery period in the instant case, Defendant Southern knew that it was in possession of these surveillance tapes, but at no time prior to trial did Defendant Southern allow Plaintiff's

attorneys to inspect and/or view these damaging tapes. Due to the *intentional withholding* of these tapes by Defendant Southern, Plaintiff's attorneys were unable to adequately prepare for trial and were *totally surprised* when Defendant Southern informed them that it would seek to introduce the "newly discovered" video tapes into evidence mid-way through the trial.

Not only were these surveillance tapes irrelevant and improperly admitted by the trial court, they were highly prejudicial, and the admission of those tapes over Plaintiff's attorneys' repeated objections far outweighed any probative value which could have been remotely gained by their admission into evidence. Such evidence should be excluded if it has a tendency to confuse the issues or the jury. *MacNerland v. Johnson*, 137 Ga.App. 541, 224 S.E.2d 431, 434 (1976).

In the instant case, the surveillance tapes in question primarily depicted Plaintiff with an "unidentified female(s) on several occasions, and had absolutely no bearing on any issue that would ultimately be decided by the jury. In essence, the admission of the tapes into evidence by the trial court had the effect of confusing the issues being tried and misleading the jury. Instead of deciding the factual issues of a personal injury case, after viewing the Defendant's surveillance tapes, the jury would be mislead into thinking that they were being asked to decide the factual issues of a divorce case. Due to their prejudicial effect, these tapes should have been excluded as a matter of law. *Hendricks v. Southern Bell Tel. & Tel.*, 387 S.E.2d 593, 595 (Ga.App. 1989); *Ballew v. Kiker*, 384 S.E.2d 211 (Ga.App. 1989); *Fred F. French Management*

Co., Inc. v. Long, 314 S.E.2d 666, 669 (Ga.App. 1983); *McEachern v. McEachern*, 394 S.E.2d 92, 93 (Ga.App. 1990).

When the trial court admitted the surveillance tapes, it destroyed whatever chance Plaintiff had to receive a fair trial before an impartial jury (tribunal). In essence, the actions by the trial court violated Plaintiff's due process and equal protection rights under the State of Georgia's and the United States' Constitutions. The right to due process of law is not merely the right to have one's case heard by an impartial tribunal in the first instance, but the process of decision must be impartial in every instance and in every respect. *Wall v. American Optometric Association*, 379 F.Supp. 175 (N.D. Ga.), *aff'd*, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974).

2. Petitioner's Constitutional Rights Were Violated When The Lower Courts Allowed Damaging Evidence To Be Admitted That Was Highly Prejudicial And In Violation Of His Due Process And Equal Protection Rights Pursuant To The Constitution Of The United States.

This Court has, on numerous occasions, stressed the importance of individuals having access to the courts to seek redress for wrongs that have been wrought upon them by persons or entities. The right to be heard is a right guaranteed to all citizens of the United States by way of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

In the area of procedural due process, notice and hearing, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Due process of law is the primary and indispensable foundation of individual freedom. *Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 1439-40, 18 L.Ed.2d 527 (1967). In the case at bar, although Petitioner was afforded a trial (hearing) before a legally competent tribunal having jurisdiction over the case, Petitioner was not afforded the type of hearing contemplated by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner's trial, in essence, did not even meet the minimum requirements of due process, due to the fact that Petitioner did not even receive a fair trial before an impartial jury (tribunal). The admission of the surveillance tapes into evidence at Petitioner's trial by the trial court was grossly unfair, and the trial court erred in admitting those tapes over Petitioner's attorneys' repeated objections. Such a total disregard for one's constitutional rights by a lower court should not be tolerated by this Court under any circumstances.

In *Boddie v. Connecticut*, 401 U.S. 371, 92 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971), this Court clearly defined the minimum requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution by holding:

> "Although many controversies have raged about the cryptic and abstract words of the Due Process Clause, . . . there can be no doubt that at a minimum they require that deprivation of life,

> liberty or property by adjudication be precedent by notice and opportunity for hearing appropriate to the nature of the case," citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Although Petitioner was afforded a trial (hearing) in which he had the opportunity to prove that Respondent Southern Railway Company was negligent and was the proximate cause of the injuries he received as a result of the accident which occurred on January 3, 1990, the fact that the Court of Appeals failed to grant Petitioner a new trial, based upon the errors that the trial court committed during the actual trial, prevented Petitioner from having the type of hearing that would have met constitutional standards pursuant to this Court's holdings in *Boddie* and *Mullane*, supra. In the case at bar, at a minimum, Petitioner should not have been deprived of his property interest without the Court of Appeals adequately determining whether or not Petitioner's constitutional rights were actually violated by the trial court.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals of the State of Georgia in this matter.

This 25th day of *January*, 1994.

Respectfully submitted,

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APPENDIX

SECOND DIVISION
POPE, C.J.
BIRDSONG, P.J., ANDREWS, J.

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed, (Court of Appeals Rules 4 and 48, March 1, 1985)

APR 14 1993

In the Court of Appeals of Georgia

A93A0604. WILSON v. SOUTHERN RAILWAY COMPANY et al. (Bi-40)

BIRDSONG, Presiding Judge.

Appellant/plaintiff Willie W. Wilson, Jr. filed a complaint, as amended, against appellees/defendants Southern Railway Company (Southern), Cannon Express Corporation (Cannon), Jeffrey R. Walsh (Walsh), and National Continental Insurance Company (National). Appellant alleges that the combined negligence of appellees caused him to sustain severe injuries as a result of a railroad crossing collision between a Southern train and a tractor-trailer owned by Cannon, driven by Walsh, and insured by National.

Plaintiff was a brakemen [sic] employed by Southern. The train crew and engineer (crew) noticed a tractor-trailer rig stopped on the railroad crossing. The train was approximately one and one-half miles from the crossing at that point and traveling approximately 40 m.p.h.; it was over a mile in length. When the train was between

one and one and one-half miles from the crossing, the crew observed that the rig still was not moving and the engineer applied the train brakes. Although the conductor estimated that he first observed the rig about three-quarters mile away from the crossing, it then appeared to be stopped and he could tell it was unable to move. Approximately one-quarter of a mile from the crossing, it appeared to the engineer that the rig was not going to move and that normal braking would not suffice; the engineer applied the emergency brakes. The train collided with the rig, injuring appellant.

The trial court granted National's, Cannon's, and Walsh's motion for directed verdict at the conclusion of plaintiff's case; the jury returned a verdict in favor of appellee Southern. This appeal is from the judgment granting said motion for directed verdict, and from the jury verdict in behalf of Southern. *Held*:

1. Appellees Cannon, Walsh and National assert that the appeal should be dismissed because appellant filed his notice of appeal prematurely. Judgment was filed and entered on the jury verdict in favor of Southern on July 14, 1992; judgment was filed and entered on July 23, 1992, granting in writing the motion for directed verdict in favor of Cannon, Walsh and National; on July 17, 1992, a notice of appeal was taken from the order of July 14, 1992, and from the oral order of the trial court on July 8, 1992, granting the motion for directed verdict on the record. The notice of appeal was not premature as to the appeal of the judgment entered on July 14, 1992. Accordingly, "all *judgments*, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by

the appellate court, without regard to the appealability of the *judgment*, ruling, or order standing alone and without regard to whether the *judgment*, ruling, or order appealed from was final or was appealable by some other express provision of law." (Emphasis supplied.) OCGA § 5-6-34 (d), as amended. Moreover, assuming arguendo the notice of appeal, as filed, was technically defective, it was "sufficient to notify the opposing party that an appeal was being taken [and] it was not so defective as to mislead or prejudice him," within the meaning of *Steele v. Cincinnati Ins. Co.*, 252 Ga. 58, 60 (311 SE2d 470). Compare *Realty Trading Co. v. Fiduciary Leasco*, 200 Ga. App. 261 (1 a) (407 SE2d 486). Additionally, if the appeal had been premature by attempting to appeal the oral order granting directed verdict, the notice of appeal would have "ripened" when the written order thereof subsequently was entered. See *O'Kelly v. State*, 196 Ga. App. 860 (1) (397 SE2d 197). For each of these reasons, appellees' assertion of lack of appellate jurisdiction is without merit.

2. The trial court did not err in granting the motion for directed verdict in favor of appellees Cannon, Walsh, and National. " 'It is not error to direct a verdict if the evidence and all reasonable deductions therefrom, considered in the light most favorable to the respondent to the motion, demands the verdict and fails to disclose any material issue for jury resolution.' [Cits.] A directed verdict is proper even where there is conflicting evidence where the plaintiff simply failed to prove his case." (Emphasis omitted.) *Chester v. Bouchillon*, 253 Ga. 175, 177 (3) (317 SE2d 525). "Negligence is not to be presumed, but is a matter for affirmative proof." *Johnson v. Critter Getters Exterm. Co.*, 194 Ga. App. 314, 316 (390 SE2d 434). Thus,

as a general rule, "[t]he mere fact of injury or damage does not give rise to a presumption or inference of negligence." *Housing Auth. &c. v. Famble,* 170 Ga. App. 509, 524 (317 SE2d 853). "In the absence of affirmative proof of negligence, we must presume performance of duty and freedom from negligence." *Johnson,* supra.

Hardy v. Brooks, 103 Ga. App. 124 (2) (118 SE2d 492) involved an appeal from a judgment overruling general demurrers to an amended petition, and is distinguishable factually from the case at bar. Moreover, there exists no evidence in the record that the dangerous situation of the rig being stalled on the railroad crossing was "created" by any act or omission, negligent or otherwise, of appellee Walsh within the meaning of *Hardy,* supra. See also *Chastain v. Fugua Indus.,* 156 Ga. App. 719, 721 (1) (275 SE2d 679). Secondly, the existence of the rig was apparent immediately to the engine and train crew as soon as the train rounded a curve in the track, and the conductor realized the train was stopped and unable to move when he saw it about three-quarters mile from the crossing. There exists no duty to warn of the obvious. See generally *Soto v. Roswell Townhomes,* 183 Ga. App. 286, 287 (358 SE2d 670).

Additionally, there exists no evidence which affirmatively establishes that, under the attendant emergency conditions, appellee Walsh could have provided a warning to the crew adequate to avoid the collision. The law will not require a useless act (*Southern R. Co. v. Lawson,* 256 Ga. App. 798, 800 (1 b) (353 SE2d 491)). Cf., *Hildebrand v. Los Angeles &c. R. Co.,* 350 P2d 65, 67 (2) (SC Calif.) (any warning by the crew under the circumstances would have been futile to prevent the collision at the

crossing with the oncoming motorcycle). Unless there exists some evidence of record, albeit slight, from which a factfinder could reasonably infer or directly find that an adequate warning could have been given that would have avoided the collision, the lack of a warning would not preclude the granting of a directed verdict in favor of appellees Cannon, Walsh, and National.

Appellant testified without objection that the engineer could have stopped the train a long way from the crossing if he knew what was happening. However, he also testified that, even assuming a person knew the correct number to call in Atlanta, a warning radio call could not have been relayed to the train in two or three minutes and probably not even in ten or fifteen minutes. No evidence of record establishes that the truck driver knew whom to call in Atlanta or the dispatcher's number, or that he had access to a phone; there was no emergency phone at the crossing. Further, it would only take between one and two minutes for the train to reach the crossing after it rounded the curve, and appellant was unaware how long the rig had been stalled at the crossing before the train appeared in view. Appellant testified that before he was two or three train car lengths from the crossing, he saw a man at the crossing, who he believed to be the driver, waving a warning signal. Appellant further testified that if the man had come down the tracks *for an unspecified distance* and given the same warning signal, the collision "probably would have not happened." However, appellant also testified that right after the train rounded the curve the crew saw the truck; shortly thereafter, the conductor said the truck may not move so the engineer "started throttling off" (slowing the

train); a little further down the track, the conductor said they ought to get some brakes, so the engineer "started putting the brakes on." The brakes were initially applied one-half to one mile from the crossing. Appellant made an admission that he knew there was a "pretty good danger" when the train reached the brick yard (about a quarter of a mile from the crossing), and at that point the emergency brakes were applied. Even then the train went at least three to four cars beyond the crossing after striking the truck. From this testimony, it is established without contradiction that anyone giving an adequate warning would have had to have been far enough up the tracks and in a visible location so as to alert the crew and allow them enough reaction time to apply their emergency brakes more than four car lengths beyond the brick yard. There exists no evidence of record from which the jury could conclude that appellee Walsh had the *time and opportunity,* under the existing emergency conditions, to position himself in such a manner as to give an adequate warning.

Additionally, after testifying that if the emergency brakes had been applied when the crew first saw the truck and that the train would have stopped short of it, appellant gave the following vague and equivocal testimony: "If we was in emergency when we first come around [the curve], we would have got stopped probably right at it *or may have still got to it.* It is hard to say what a train [is] going to do." (Emphasis supplied.)

In considering a ruling on a motion for directed verdict, the evidence must be construed most favorably to the party opposing the motion. *Mattox v. MARTA,* 200 Ga. App. 697 (1) (409 SE2d 267). In *Douglas v. Sumner,* 213

Ga. 82 (3) (97 SE2d 122), however, the Supreme Court applied the established rule that " '[t]he testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him when it is self-contradictory, vague, *or* equivocal,' " and concluded the trial court did not err in granting nonsuit at the conclusion of plaintiff's testimony. (Emphasis supplied.) In *Marett v. Professional Ins. Careers*, 201 Ga. App. 178 (1 c) (410 SE2d 373), this court expanded upon and applied this rule holding: " 'The law in this state is that the testimony of a party offering himself as a witness in his own behalf is to be construed most strongly against him when it is contradictory, vague or equivocal [cit.]; even as against a directed judgment, [cits.], and that construction *most unfavorable to his position* should generally be adopted. [Cit.] If that most unfavorable position shows that the party is not entitled to prevail, unless other evidence shows compellingly that he should prevail, he must lose. [Cit.]' *Veal v. Fraser*, 155 Ga. App. 157, 161 (2) (270 SE2d 250)." (Emphasis supplied.) See *Johnson v. Curenton*, 127 Ga. App. 687, 690 (195 SE2d 279). However, if a reasonable explanation is subsequently offered by the witness as to why his testimony was contradictory, vague, or equivocal, the testimony will not be construed against the party-witness; the burden rests upon the party giving such testimony to offer a reasonable explanation, and whether this has been done is an issue of law for the trial judge. See *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 30 (2) (343 SE2d 680). Appellant's testimony regarding whether the train could have been stopped, by immediate application of emergency brakes as soon as it rounded the

curve and the truck was seen, is both vague and equivocal. We find, as a matter of law, that no reasonable explanation was given by appellant for such vagueness and equivocation. Accordingly, we will construe the testimony against appellant in the manner most unfavorable to his position, and we conclude that the train could not have been stopped before hitting the truck even if the emergency brakes had been applied as soon as the train rounded the curve and the vehicle was in view (about one and one-half miles away). Moreover, there exists no evidence of record as to when or why the truck stopped on the crossing tracks. In view of the posture of the record, the trial court did not err in granting a directed verdict in behalf of appellees Cannon, Walsh, and National, where as here, " ' "plaintiff simply fails to prove his case" ' " (*Neal v. Miller,* 194 Ga. App. 231, 233 (390 SE2d 125)).

3. Appellant asserts the trial court erred in admitting surveillance tapes that appellant had requested and of which he was not informed or given access to until the evening of the second day of trial, notwithstanding appellant's pretrial request by interrogatories for the disclosure of any surveillance or tapes of appellant. Although Southern's written response to the interrogatories is not included in the record, counsel for Southern stated on the record, without contradiction by appellant, that in response to these questions Southern objected to the question and declined to answer for the reasons stated in their objection, and that they neither admitted nor denied having appellant under surveillance or having tapes of him. The record fails to establish and support a

claim that Southern in fact deliberately withheld information as to the surveillance and tapes to prejudice appellant. Compare *Jones v. Atkins*, 120 Ga. App. 487, 490-491 (171 SE2d 367). In the absence of a deliberate withholding for improper purposes, it is the general rule that "[w]hen a party proffers at trial evidence which should have been disclosed during discovery, exclusion of the proffered evidence is not an authorized sanction. The proper sanction is to order a postponement or a mistrial." *White v. Lance H. Herndon, Inc.*, 203 Ga. App. 580, 581 (5) (417 SE2d 383); compare *Jones*, supra at 491 (exclusion proper only where party deliberately withholds).

Moreover, appellant was given three full days in which to prepare before the tapes were admitted in evidence. When the tapes were admitted, appellant did not request a postponement. Although appellant did state that it was renewing its motion for mistrial, just before the jury was recalled and the tapes introduced when trial resumed following weekend recess, the record reveals that the only prior motion for mistrial made by appellant was in regard to the issue addressed in Division 5, infra, and was not related to the ruling regarding the videotapes. Appellant's renewal of a mistrial motion, if intended to relate to the issue of admissibility of the tapes, was not in proper form. Cf., *Gully v. Glover*, 190 Ga. App. 238, 241 (4) (378 SE2d 411) (objection not in proper form). Appellant made no prior motion for mistrial regarding the tapes; he could not *renew* a motion which he had not made. Further, in view of the time given appellant's counsel to review the tapes, and no claim by counsel following the weekend recess that he had been unable to complete his review of the videotapes, there

would have been no breach of discretion in denying a motion for mistrial due to admission of the tapes even had one been properly made. Further, appellant elected not to make any request for postponement after the weekend recess, either before the special investigator testified concerning the videotapes or before the admission of the tapes in evidence. While appellant did assert that he had not seen one particular tape, it was merely an edited version or summary of scenes from the other tapes appellant had been given, and no request for postponement was made for time to review the summarized tape before it was shown to the jury.

Under the above circumstances, the trial court did not abuse its discretion in refusing to exclude the testimony. *City of Monroe v. Jordan*, 201 Ga. App. 332, 336 (4) (411 SE2d 511); compare *Sackett v. L. L. Minor Co.*, 244 Ga. 375 (1) (260 SE2d 37); *Nathan v. Duncan*, 113 Ga. App. 630, 631 (7) (149 SE2d 383).

4. Appellant asserts the trial court erred in admitting the videotapes because they were irrelevant, biased, unfair, and highly prejudicial. The tapes were offered as rebuttal evidence of appellant/plaintiff's testimony regarding the nature and extent of his injuries. The tapes showed appellant engaged in various activities requiring movement of his neck, arms and back, and his driving an automobile. Thus, the tapes had some logical relevance as to the scope of appellant's injuries and as to the issue of damages. "Unless the potential for prejudice in the admission of evidence substantially outweighs its probative value '[t]he Georgia rule favors the admission of any relevant evidence, no matter how slight its probative value. Evidence of doubtful relevancy or competency

should be admitted and its weight left to the jurors. Where evidence is offered and objected to, if it is competent for any purpose, it is not erroneous to admit it.' " *West v. Nodvin*, 196 Ga. App. 825, 828 (3 b) (397 SE2d 567); compare *McEachern v. McEachern*, 260 Ga. 320, 321 (1) (394 SE2d 92). " '[A]bsent a manifest abuse of discretion, a court's refusal to admit evidence on grounds of lack of relevance will not be disturbed on appeal.' " *Friedman v. Friedman*, 259 Ga. 530 (3) (384 SE2d 641). The trial court did not abuse its discretion when it overruled the objection to admissibility on the grounds of relevancy. Moreover, assuming without deciding that appellant properly raised an objection based on legal relevance (that the relevance of the evidence outweighed its prejudicial impact), we also find the trial court did not abuse its discretion (see generally *Carroll v. State*, 261 Ga. 553 (2) (408 SE2d 412)) in overruling that portion of the motion based on the grounds the evidence was biased, unfair, and highly prejudicial. Further, having examined the tapes in question, we are satisfied that the relevance of the tapes did outweigh any prejudicial impact thereof. Additionally, before the tapes were offered, the special investigator for the insurance company testified and proceeded without objection to lay a foundation for the admission of the videotapes which included stating briefly what the tapes depicted. In the course of this foundation testimony, the investigator testified as to which tapes showed appellant with an unidentified woman, which tapes showed him exiting or entering a motel with an unidentified woman, and which tapes showed him in the company of two unidentified women in one day. No objection was made to these testimonial

descriptions as to the content of the various tapes; and " '[a]ll evidence is admitted as a matter of course unless a valid ground of objection is [timely] interposed.' " *Scott v. State*, 206 Ga. App. 23, 26 (1 c) (424 SE2d 328). As the jury thus had testimonial evidence before it regarding appellant's various meetings with unidentified women, and his entry and exiting of a motel with an unidentified woman, any pictorial representation of this conduct in the videotapes would merely be cumulative of the testimony to this effect and previously received in evidence without objection. Thus, if error had occurred due to the pictorial representation of such conduct, it would be harmless. See *Young v. State*, 191 Ga. App. 651, 653 (2) (382 SE2d 642) (evidence harmless where admissible evidence of same fact is before jury); *Platt v. National Gen. Ins. Co.*, 205 Ga. App. 705, 710 (1) (423 SE2d 387).

5. Appellant asserts the trial court erred in recognizing before the jury one of the senior partners of the firm representing Southern thereby exemplifying a biased attitude on the part of the court toward Southern. This incident was not transcribed, and this court cannot therefore review the verbatim exchange which occurred. On the record, appellant made a belated objection to the colloquy.

We find that the objection was not timely, and that by failing to call for an immediate out-of-court hearing on the matter, the trial court was deprived of an opportunity to give the jury prompt corrective instructions concerning the exchange. Appellant also made a motion for mistrial (and apparently subsequently renewed said motion), which the trial court denied. We find no abuse of discretion on the part of the trial court.

The record reflects the following offer by appellant: "The judge addressed the senior partner of the defendant's law firm when he came in the courtroom and had a seat *in the back of the courtroom*. . . . 'Hey, here comes a young lawyer, a good friend of mine.' All of this is taking place during direct examination while the plaintiff is putting up his case. . . . [T]he senior partner of defendant's law firm stands up and says: 'During my whole 58 years of practice of law I never learned nothing as a lawyer. . . . ' And these comments go back and forth. At that time the judge should have recused himself . . . because it appears he's biased and partial toward the defense. Since the plaintiff's counsel made that motion, the judge has made just about every ruling against the plaintiff. His rulings have been punitive." (Emphasis supplied.)

The record provides no support for the claim that the trial court thereafter made punitive rulings against appellant. Further, nothing in this offer of proof establishes the senior partner was addressed by name or, in fact, was identified by the trial judge to the jury as the senior partner of Southern's law firm. Appellant did not request any voir dire of the jury concerning their knowledge of these matters. Error must be established affirmatively by the record and we will not presume error. *Armech Svc. Co. v. Rose Elec. Co.*, 192 Ga. App. 829, 830 (1) (386 SE2d 709); *Williams v. State*, 188 Ga. App. 496 (3) (373 SE2d 281); see *Gillespie v. Gillespie*, 259 Ga. 838 (388 SE2d 688). Moreover after the close of argument, the trial court charged the jury inter alia that: "I have not intended to do or say anything during the trial of this case . . . which would hint or suggest to you which of the parties I feel should

prevail or what your verdict should be. My interest in this case has been to see that it was fairly presented . . . according to the law."

"Although Canon 3 (C) (1) of the Code of Judicial Conduct indicates a judge should disqualify himself in any proceeding in which his 'impartiality might reasonably be questioned,' the conversation between the judge and plaintiff in this case did not raise a reasonable question of the judge's impartiality." *Von Hoff v. Carmichael*, 204 Ga. App. 760, 762 (420 SE2d 643). Further, we find the trial court did not abuse its discretion in denying appellant's motions for mistrial.

6. Appellant's enumeration of error "E" asserts therein more than one separate charging error in violation of OCGA § 5-6-40. Accordingly, we elect not to review any of these claims of error. *Murphy v. State*, 195 Ga. App. 878 (6) (395 SE2d 76); compare *Morris v. State Farm & c. Co.*, 203 Ga. App. 839, 841 (6) (418 SE2d 119) and *Robinson v. State*, 200 Ga. App. 515, 518 (2) (408 SE2d 820).

Judgment affirmed. Andrews, J., concurs. Pope, C. J., concurs in Divisions 1, 4, 6, and in judgment.

Court of Appeals
of the State of Georgia

ATLANTA, MAY 5, 1993

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A93A0604. WILSON V. SOUTHERN RAILWAY COMPANY ET AL

UPON CONSIDERATION OF THE MOTION FOR RECONSIDERATION FILED ON BEHALF OF APPELLANT IN THE ABOVE STYLED CASE, IT IS HEREBY ORDERED THAT PAGE 5 ATTACHED HERETO BE SUBSTITUTED FOR PAGE 5 OF THE ORIGINAL OPINION DATED APRIL 14, 1993. MOTION FOR RECONSIDERATION IS HEREBY DENIED.

[SEAL]

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta MAY 5 1993

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin
CLERK.

realized the truck was stopped and unable to move when he saw it about three-quarters mile from the crossing. There exists no duty to warn of the obvious. See generally *Soto v. Roswell Townhomes,* 183 Ga. App. 286, 287 (358 SE2d 670).

Additionally, there exists no evidence which affirmatively establishes that, under the attendant emergency conditions, appellee Walsh could have provided a warning to the crew adequate to avoid the collision. The law will not require a useless act (*Southern R. Co. v. Lawson*, 256 Ga. App. 798, 800 (1 b) (353 SE2d 491)). Cf., *Hildebrand v. Los Angeles & c. R. Co.*, 350 P2d 65, 67 (2) (SC Calif.) (any warning by the crew under the circumstances would have been futile to prevent the collision at the crossing with the oncoming motorcycle). Unless there exists some evidence of record, albeit slight, from which a factfinder could reasonably infer or directly find that an adequate warning could have been given that would have avoided the collision, the lack of a warning would not preclude the granting of a directed verdict in favor of appellees Cannon, Walsh, and National.

Appellant testified without objection that the engineer could have stopped the train a long way from the crossing if he knew what was happening. However, he also testified that, even assuming a person knew the correct number to call in Atlanta, a warning radio call could not have been relayed to the train in two or three minutes and probably not even in ten or fifteen

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: OCTOBER 05, 1993

Hillman J. Toombs
142 Mitchell Street
Suite 310
Atlanta GA 30303

Case No. S93C1310

WILLIE E. WILSON, JR. V. SOUTHERN RAILWAY COMPANY

COURT OF APPEALS CASE NO. A93A0604

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

_____

_____

_____

_____

Sincerely,

Sherie M. Welch, Clerk

_____

SUPREME COURT OF GEORGIA

ATLANTA OCTOBER 28, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S93C1310

WILLIE E. WILSON, JR. V. SOUTHERN RAILWAY COMPANY

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Sherie M. Welch, Clerk.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.